BEATRICE FERNANDEZ

v.

SISTEM PENERBANGAN MALAYSIA & ANOR

COURT OF APPEAL, PUTRAJAYA
ABDUL HAMID MOHAMAD FCJ
ARIFIN ZAKARIA JCA
MOHD GHAZALI YUSOFF JCA
[CIVIL APPEAL NO: W-02-186-96]
5 OCTOBER 2004

CONSTITUTIONAL LAW: *Fundamental liberties - Equal protection - Federal Constitution, art. 8 - Equality - Gender discrimination - Whether applies in collective agreements or employment contracts as between two private individuals - Whether protection in art. 8 only available to private individual as against the State - Whether constitutional law remedies available to private individual whose fundamental rights have been violated by another private individual - Constitutional law as a branch of public law - Whether constitutional law litigation must necessarily involve the State as a party*

LABOUR LAW: *Employment - Termination of service - On ground of pregnancy as per collective agreement - Whether discriminatory - Whether collective agreement violates fundamental liberties under art. 8 Federal Constitution - Whether collective agreement must conform to tenets of equality under art. 8(1) - Protection against 'religion, race, descent, place of birth or gender' discrimination - Whether art. 8(2) applies to collective agreement - Whether contravenes art. 8(2)*

The terms and conditions of the appellant's employment with Sistem Penerbangan Malaysia ('the Airline') were governed by a collective agreement, art. 2(3) of which provided that she must resign from her position as a flight-stewardess (or be terminated) if ever she should become pregnant. As it transpired, the appellant did become pregnant in the course of her employment, and the Airline, upon her refusal to submit her resignation, terminated her services. Aggrieved, the appellant brought an action in the High Court praying for, *inter alia*, a declaration that: (i) the collective agreement (in particular arts. 2, 16 and 19 thereof) was *ultra vires* art. 8 of the Federal Constitution and, therefore, void; and (ii) the termination of the appellant's services was in contravention of s. 14(3) of the Industrial Relations Act 1967 and ss. 37 and 40 of the Employment Act 1955 and, therefore, void. The learned judge rejected the appellant's action and she appealed to the Court of Appeal.

Held (dismissing the appeal)
Per Abdul Hamid Mohamad FCJ delivering the judgment of the court:

[1a] Constitutional law is a branch of public law; it deals with the contravention of an individual's rights by a public authority. Where the rights of a private individual are infringed by another private individual, constitutional law (substantive or procedural) will take **no** cognisance of it. The very concept of 'fundamental rights' involves State action. These are rights guaranteed by the State for the protection of an individual against the arbitrary invasion of such rights by the State. Where the invasion is by another private individual, the aggrieved individual may have his remedies under private law, but constitutional remedies will **not** be available. (pp 407 f-h & 408 a-c)

[1b] Article 8(1) of the Federal Constitution has no application to the facts of the instant case. A collective agreement is **not** a piece of legislation or 'law' to be taken cognisance of by the constitutional court; it is a 'contract' to be taken cognisance of by the Industrial Court, and is enforceable by way of an award of the Industrial Court. (p 408 d-e)

[1c] Article 8(2) of the Federal Constitution also has no application in the present case. Article 2(3) of the collective agreement was **not** discriminatory in terms of 'religion, race, descent or place of birth' or even 'gender'. Hence, it did not contravene art. 8(2) of the Federal Constitution. (p 408 f)

[1d] The appellant's assertion that the Airline was, at the material time, "a government agency", was not evidentially substantiated. Apart from a statement from the Bar, the appellant did not even lead any evidence to show that the Airline was a 'public authority' at the relevant time. (pp 408 g-h & 409 a, d)

[2] Section 37 of the Employment Act 1955, which relates to 'Maternity Protection' and the 'Length of Eligible Period and Entitlement to Maternity Allowance', clearly had no application to the facts of the present case. Similarly, s. 40 of the Employment Act 1955, which deals with the 'Loss of Maternity Allowance for Failure to Notify Employer', was completely irrelevant when applied to the factual matrix of the instant case. (p 409 e-g)

[Decision of High Court affirmed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Terma dan syarat-syarat pekerjaan perayu dengan Sistem Penerbangan Malaysia ('Sistem Penerbangan') adalah dikawal oleh perjanjian bersama, di mana fasal 2(3)nya menyebut bahawa beliau harus meletak jawatan dari jawatannya sebagai pramugari penerbangan (atau diberhentikan) sekiranya beliau didapati mengandung. Perayu bagaimanapun telah mengandung, dan telah diberhentikan kerja oleh Sistem Penerbangan apabila beliau enggan meletakkan jawatan. Terkilan, perayu memfail tindakan di Mahkamah Tinggi memohon perintah, antara lain, bahawa: (i) perjanjian bersama (terutama fasal 2, 16 dan 19nya) adalah *ultra vires* fasal 8 Perlembagaan Persekutuan, dan kerana itu batal; dan (ii) penamatan perkhidmatannya adalah bertentangan dengan s. 14(3) Akta Perhubungan Perusahaan 1967 dan ss. 37 dan 40 Akta Pekerjaan 1955, dan kerana itu batal. Yang arif hakim menolak tuntutan perayu dan perayu merayu ke Mahkamah Rayuan.

Diputuskan (menolak rayuan)
Oleh Abdul Hamid Mohamad HMP (menyampaikan penghakiman mahkamah):

[1a] Undang-Undang Perlembagaan adalah satu cabang undang-undang awam; ia menyentuh perlanggaran hak-hak seseorang individu oleh pihak berkuasa awam. Di mana hak-hak seorang individu dilanggar oleh seorang individu lain, undang-undang perlembagaan (substantif mahupun prosedural) tidak mengambil endah mengenainya. Konsep 'hak asasi' itu sendiri melibatkan tindakan oleh Negara. Ini adalah hak-hak yang dijamin oleh Negara bagi maksud melindungi individu-individu terhadap tindakan Negara melanggar hak-hak tersebut secara sebelah pihak. Di mana perlanggaran adalah oleh seorang individu yang lain, individu yang terkilan boleh mendapatkan remedinya di sisi undang-undang persendirian, tetapi tidak di sisi undang-undang perlembagaan.

[1b] Fasal 8(1) Perlembagaan Persekutuan tidak terpakai kepada fakta kes di sini. Suatu perjanjian bersama bukanlah sejenis perundangan atau 'undang-undang' yang harus diambil peduli oleh mahkamah perlembagaan; ia sebaliknya adalah suatu 'kontrak' yang perlu diambil perhatian oleh Mahkamah Perusahaan, dan dilaksanakan melalui award mahkamah tersebut.

[1c] Fasal 8(2) Perlembagaan Persekutuan juga tidak terpakai kepada kes di sini. Fasal 2(3) perjanjian bersama tidak bersifat diskriminasi dari segi 'ugama, bangsa, keturunan atau tempat lahir' ataupun 'gender'. Maka itu, ia tidak melanggari fasal 8(2) Perlembagaan Persekutuan.

[1d] Pengataan perayu bahawa Sistem Penerbangan adalah pada waktu material 'sebuah agensi kerajaan' tidak dibuktikan melalui keterangan. Selain dari kenyataan dari meja peguam, perayu tidak mengemukakan sebarang keterangan yang menunjukkan bahawa Sistem Penerbangan adalah sebuah 'pihak berkuasa awam' pada waktu berkenaan.

[2] Seksyen 37 Akta Pekerjaan 1955, yang berkaitan dengan 'Perlindungan Bersalin' dan 'Tempoh Layak dan Hak Elaun Bersalin', jelas tidak terpakai kepada fakta kes semasa. Begitu juga, s. 40 Akta Pekerjaan 1955, yang menyentuh perkara 'Kehilangan Elaun Bersalin Kerana Gagal Memberitahu Majikan', sama sekali tidak relevan kepada fakta kes di sini.

Keputusan Mahkamah Tinggi disahkan.]

Case(s) referred to:
Air India v. Nergesh Meerza [1981] 68 AIR 1829 ***(not foll)***

Legislation referred to:
Employment Act 1955, ss. 37, 40
Federal Constitution, art. 8(1)
Industrial Relations Act 1967, s. 14(3)
Interpretation Acts 1948 and 1967, s. 17A
Indian Constitution [Ind], arts. 19, 32

For the appellant - M/s Fernandez & Co
For the 1st respondent - M/s Shearn Delamore & Co
For the 2nd respondent - M/s P Kuppysamy & Co

Reported by Gan Peng Chiang

JUDGMENT

Abdul Hamid Mohamad FCJ:

The appellant started working as a flight stewardess, Salary Grade B, with the first respondent on 14 October 1980. The terms and conditions of the service was governed by the collective agreement dated 3 May 1988. Article 2(3) of the First Schedule to the collective agreement requires the appellant to resign on becoming pregnant. In the event she fails to resign the company shall have the right to terminate her services. Upon the appellant becoming

pregnant and refusing to resign, the first respondent terminated her services. The appellant commenced proceedings in the High Court praying for a declaration that:

(a) the collective agreement dated 1 September 1987 contravened art. 8 of the Federal Constitution and is therefore void;

(b) Articles 2, 14 and 19 of the collective agreement are void as they contravene art. 8 of the Federal Constitution;

(c) The appellant's termination of service is void as it contravenes s. 14(3) of the Industrial Relations Act 1967 and [s. 7 of the Labour Act 1955.]

She also prayed for damages for loss of employment and benefits derived therefrom, payment of salary and benefits from 1 April 1991, interests and costs.

The learned High Court judge dismissed the application with costs. The Appellant appealed to this court. We dismissed the appeal. These are our grounds.

Learned counsel for the appellant argued that art. 8 of the Federal Constitution does not say that only the State should not practise discrimination. So, the provision does not only apply to the State. Learned counsel further argued that in 1991, the first respondent was "a government agency".

It is elementary that constitutional law is a branch of public law. As Dr. (Justice) Durga Das Basu in his book "Comparative Constitutional Law" puts it:

> Hence, the correct position is that in constitutional law, as a branch of public law, either or both the parties must be the State, as distinguished from a private individual.
>
> From the Public Law stamp of Constitutional Law, the following consequences arise:
>
> I. As a branch of public law, constitutional law deals with the contravention of individual rights by a public authority, ie, the State itself or any of its agencies, as distinguished from another individual.
>
> II. Where both the parties affected by the infringement of a right are private individuals, Constitutional Law would take no cognisance of it by extending its substantive or procedural provisions.

> Thus, even where the right violated by an individual is protected by the Constitution as a 'fundamental' right, nothing in art. 19 or 32 of the Indian Constitution can be invoked by the other individual who is aggrieved by such violation.
>
> The very concept of a 'fundamental right' involves State action. It is a right guaranteed by the State for the protection of an individual against arbitrary invasion of such right by the State. Where the invasion is by another private individual, the aggrieved individual may have his remedies under private law, but the constitutional remedy would not be available.

To give an example, a father may not allow his daughter to marry a person of a different race but allows his son to do the same. The daughter has no constitutional remedy.

In any event, we fail to see how, on the facts, the case is caught by art. 8 of the Federal Constitution. Clause (1) declares that all persons are equal before the law and entitled to equal protection of the law. A collective agreement is not "law" in the context of art. 8. It is a contract when taken cognizance of by the Industrial Court, is enforceable as an award of that court. In other words, it is similar to a court order. Even a court order is not "law" in the context of art. 8. It is only an order binding on the parties therein. Similarly, a collective agreement, though taken cognizance of by the Industrial Court is only binding on the parties therein, though enforceable by the Industrial Court.

The discrimination prohibited by art. 8(2) of the Federal Constitution as at the date applicable to this case is on the ground only of religion, race, descent or place or birth, none of which applies to this case. The amendment to the Constitution which added the word "gender" to that provision only took effect from 28 September 2001. In any event, we do not think that it can be argued that art. 2(3) of the First Schedule of the collective agreement is discriminatory just as it cannot reasonably be argued that the provision of the law giving maternity leave only to women is discriminatory as against men.

In our judgment, this ground has no merits.

Learned counsel for the appellant, in a cursory manner, stated from the bar that the first respondent was, at that time, "a government agency". He did not refer to any evidence to support it.

On the other hand, we note that the appellant herself in her affidavit in support of her originating summons clearly stated:

> 2) Pihak Penentang Pertama adalah sebuah Syarikat yang ditubuhkan di Malaysia dan pejabat berdaftar mereka beralamat di ...

We could not find any evidence whatsoever, neither was it pointed out to us, that the first appellant was "a government agency" as casually mentioned by the learned counsel for the appellant. If the appellant wants the court to decide on that issue, the appellant should have introduced evidence in her affidavits to that effect. The appellant had not done so.

The case of *Air India v. Nergesh Meerza* [1981] 68 AIR 1829 (SC) was brought to our attention. We do not think we have to dwell at length on that case. After all it is a decision of a court in a different jurisdiction based on the law in that country, the peculiar position of Air India *vis-a-vis* the State and the facts of that case. We are always of the view that it is very dangerous merely to lift one or two passages from a judgment in a foreign jurisdiction and apply it as if it is our written law.

In any event, a case has to be decided on its facts. As has been pointed out, the appellant herself did not introduce any evidence, not even a statement, that the first appellant is "a public authority" to bring it within the ambit of the constitutional provision. A mere statement from the bar that the first appellant was a government agency is not sufficient.

Next, it was argued that art. 2(3) of the First Schedule to the collective agreement contravenes the provisions of s. 37 of the Employment Act 1955. That section is too long to reproduce. Suffice for us to say that that section talks about entitlement to maternity leave, the length of the period of maternity leave a female employee is entitled to and the entitlement to maternity allowance. We just do not see the relevance of that provision to the facts of this case.

Our attention was also drawn to the provision of s. 40 of the Employment Act 1955 and we were urged to give a purposive interpretation as provided by s. 17A of the Interpretation Acts 1948 and 1967. With respect, we are unable to see the relevance of s. 40 of the Employment Act 1955. That section only requires a female employee who is leaving her employment to give four months notice to her employer about her pregnancy failing which she would not be entitled to any maternity allowance. We fail to see what kind of "purposive interpretation" could be given to the provision to render the provisions of the collective agreement null and void. This ground too has no merits.

On these grounds we dismissed the appeal with costs. The deposit was ordered towards taxed costs.